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IN THE

Supreme Court of the United States

_____ TERM, 1967

No. 734

EDWARD L. GLADNEY,

Petitioner,

versus

REVIEW COMMITTEE, COMPOSED OF HARVEY H. HOWINGTON, JR., HARRY E. MOCK and WILLIAM YERGER,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit which was entered in this action on August 21, 1967.

CITATIONS TO OPINIONS BELOW

The unreported opinion and judgment of the United States Court of Appeals, dated August 21, 1967, is printed in Appendix A, pp. 15-16.

The opinion and judgment of the United States District Court for the Western District of Louisiana dated August 16, 1966, reported at 257 F. Supp. 57 is printed in the record reviewed by the Court of Appeals below which has been filed with this application.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Involved herein are Articles I, II and III of the United States Constitution, and the doctrine of separation of powers required thereby. The statutes involved are 7 U.S.C. 1344 (f) (8); 7 U.S.C. 1361-68.

STATEMENT OF THE CASE

This case arises from the judicial review of an administrative cotton allotment determination in accordance with the Agricultural Adjustment Act of 1938, 7 U.S.C. 1361-68.

In 1964 the petitioner, a cotton farmer, appealed to the district court from the administrative agency's determination of his cotton allotment. The district court found the determination to have been based upon an error of law and remanded the case to the agency. The agency made a new determination whereby the petitioner's allotment was increased by some 100 acres. Shortly thereafter, the agency appealed from the district court's decision.

On appeal, the Court of Appeals affirmed the district court's decision. It agreed that the original administrative determination of petitioner's allotment had been based upon an error of law. The appellate court also stated that it found no reversible error in the district court's decision.

But to its opinion the Court of Appeals attached a caveat: "that the increased allotment resulting from and required by [the district court's] judgment is not binding as a basis for future allotments."

Prior to the Court of Appeals' decision which was rendered on January 12, 1966 the administrative agency had made determinations of petitioner's allotments for 1965 and 1966 based upon his increased 1964 allotment determination. Shortly after the Court of Appeals' decision was rendered, the agency retroactively re-determined the petitioner's allotments for 1964-66 and reduced each of them by approximately 100 acres.

The petitioner immediately appealed to the district court from this latest administrative action. The district court held that the 1964-66 allotment determinations were final administrative determinations which could not be altered since Congress had not expressly granted authority for such alterations. This much of the district court's decision was correct. But the district court went on to decide that the caveat in the Court of Appeals' decision had: (1) rendered inoperative as to petitioner the statute (7 U.S.C. 1344 (f) (8)) which makes the preceding year's allotment the basis for the following year's allotment, and (2) therefore, petitioner's 1966 allotment would have no effect upon and would not form the basis of his 1967 allotment. In effect, the district court's decision set the administrative agency free to make any 1967 allotment determination that it might desire without the necessity of using any rational basis for its determination.

Petitioner appealed from this part of the district court's decision which stripped his 1966 allotment of its ordinary future effect. The agency appealed from the part

of the judgment which reversed its alteration of its final 1964-66 allotment determination but later dismissed its appeal. The Court of Appeals affirmed the district court's decision suspending the statute (7 U.S.C. 1344 (f) (8)) as to petitioner and striking from his 1966 allotment its normal future effect. The Court of Appeals denied these actions in its opinion but regardless of its denials the effects of its decision are clear: Petitioner's 1966 allotment has been shorn of its future effect. Consequently, petitioner is the only American cotton farmer who will not have his 1967 allotment determined as Congress provided in 7 U.S.C. 1344 (f) (8).

QUESTIONS PRESENTED

1. Whether the administrative agency's determinations of petitioner's 1965 and 1966 allotments, which had become final, could be modified by the Court of Appeals in the absence of express statutory authority allowing for the alteration of final allotment determinations?

2. Whether the Court of Appeals could modify the administrative agency's determination of petitioner's 1965 and 1966 allotments and substitute the modified determination for the agency's original determination?

3. Whether the Court of Appeals could render inoperative 7 U.S.C. 1344 (f) (8) insofar as it applies to petitioner's cotton farm?

REASONS FOR GRANTING THE WRIT

1.

Since final administrative agency determinations cannot be altered without congressional authority, the petitioner's 1965 and 1966 allotment determinations could not be altered so as to strip them of their normal future effect.

This court has firmly established the principle that once a determination by an administrative agency becomes final it "is not subject to revocation in whole or in part except as specifically authorized by Congress." *United States v. Seatrain Lines*, 329 U.S. 424, 432, 91 L. Ed. 396, 401 (1946). In reaffirming this principle the Supreme Court has explained that "the [administrative agency] is entirely a creature of Congress and the determinative question is not what the [agency] thinks it should do but what Congress has said it can do," *C. A. B. v. Delta Air Lines*, 367 U.S. 316, 321, 6 L. 2d 869, 874 (1961), and that "supervising agencies desiring to change existing [determinations] must follow the procedures specifically authorized by Congress and cannot rely on their own notions of implied powers in the enabling act." Id. 367 U.S. at 334, 6 L. Ed 2d at 881. Because an agency's powers are limited to those granted by Congress, an agency cannot prevent its determination from becoming final by adding a proviso to that determination to the effect that it is "subject to later amendment," Id. 367 U.S. 316, 325, or that it is subject to future "terms, conditions and limitations," *United States v. Seatrain Lines*, 329 U.S. 424, 427. An agency's determination will become final on the date upon which the regulated person "commenced operations [pursuant to the agency's determination], with the concomitant investment in facilities and personnel, not the date that abstract legal

analysis might indicate as the final date." *C. A. B. v. Delta Air Lines*, 367 U.S. 316, 325.

In its opinion below the district court recognized the principle that final administrative determinations may not be modified without specific Congressional authorization. The district court necessarily concluded that the Agricultural Adjustment Act does not contain any such specific congressional authorization for the changing of final allotments. The district court expressly concluded as a matter of law that the petitioner's 1965 and 1966 allotments were "final as to both the administrative agency and the farmer" under the holdings in the *Seatrain Lines* and *Delta Air Lines* cases. The administrative agency appealed from this holding but dismissed its appeal before the case was heard by the Court of Appeals.

In the second part of its opinion below, the district court ignored what it had said in the first part. It decreed that the 1966 administrative determination, which it had earlier recognized as a final determination and therefore irrevocable, had been partially revoked insofar as it would have had a prospective effect upon the petitioner's 1967 allotment. Petitioner appealed from this portion of the district court decision.

The Court of Appeals affirmed, stating that, by an earlier decision, it had stripped petitioner's 1966 allotment of "all prospective significance." The Court of Appeals completely ignored its lack of authority to modify administrative agency determinations. (Discussed below). But it did seek to excuse its alteration of a final administrative determination by stating that this particular determination "was not the result of a factual or policy determination" by the agency. In effect, the Court of Appeals stated

that the 1966 administrative determination was merely a conditional one issued by the agency pending the litigation concerning petitioner's 1964 allotment. Thus, refined to its essence, the Court of Appeals' position is that it could modify the agency's 1966 determination because the agency did not intend it to be a final and independent determination.

There is no evidence to support the Court of Appeals' conclusion. Furthermore, under the Supreme Court's decisions in *C. A. B. v. Delta Air Lines, supra* and *United States v. Seatrain Lines, supra,* the agency's intention in making a determination is not pertinent to the question of its finality or binding future effect. Once the determination has been made and the regulated person begins operations thereunder, the determination becomes final and binding upon the administrative agency. The agency may not forestall finality of a determination even by adding an express proviso intending to delay finality, *C. A. B. v. Delta Air Lines, supra; United States v. Seatrain Lines, supra,* much less by an unexpressed, subjective intention as the Court of Appeals seems to rely upon in its opinion.

The Court of Appeals was clearly wrong in holding that the 1966 administrative determination could be modified so as to have no future effect. The law is very clear that a final administrative agency determination cannot be changed without a specific congressional authorization. There is no such authorization for changing final allotment determinations under the Agricultural Adjustment Act. Therefore, it was clearly reversible error for the Court of Appeals to hold that the 1966 allotment had been changed in the face of well settled principles of law under which both the 1965 and 1966 allotments were final and irrevocable.

2.

Since federal courts lack the power to modify administrative agency determinations, the court of appeals could not nullify the future effect of appellant's 1966 allotment.

The Court of Appeals held that, in the first Gladney case, it had modified petitioner's 1965 and 1966 allotments so that they "* * * lost all prospective significance." In doing so the Court of Appeals violated the firmly established principle that courts will not alter or re-determine a matter the determination of which Congress has entrusted to an administrative agency.

It would be difficult to determine the origin of this principle since it has been a cardinal rule of judicial review for many decades, e.g., *Tex. & Pacific Ry. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 51 L. Ed. 553, 27 S. Ct. 350 (1907). However, one of the more recent and perhaps most cogent expressions of the principle was made in *Federal Power Commission v. Idaho Power Company*, 344 U.S. 17, 97 L. Ed. 15, 73 S. Ct. 85 (1952), in which the Supreme Court reversed a Court of Appeals judgment which had usurped an administrative function. The Federal Power Commisison had granted a power company a license to construct a hydroelectric project, conditioned upon the company's allowing the government to use the project's power lines. The Court of Appeals found that the commission had no authority to attach the condition, modified the commission's order by striking the condition, and affirmed the order as thus modified. In reversing, the Supreme Court stated:

> "* * * When the court decided that the license should issue without conditions, it usurped an administrative function * * * [T]he guiding principle, violated

> here, is that *the function of the reviewing court ends when an error of law is laid bare.* At that point the matter once more goes to the commission for reconsideration. See *Federal Communications Commission v. Pottsville Broadcasting Co.*, 309 U.S. 134, 84 L. Ed. 656, 60 S. Ct. 437; *Federal Trade Commission v. Morton Salt Co.*, 334 U.S. 37, 92 L. Ed. 1196, 68 S. Ct. 822, 1 ALR 2d 260." (Emphasis added).

The Supreme Court explained that it is the commission's judgment upon which Congress has placed its reliance for the control of licenses. Whether the Congressional objective would be achieved by simply striking the invalid condition from the order was an administrative, not a judicial decision. The Court of Appeals, after pointing out the error of law, should have remanded to the Commission, which might have reissued the order without the contested condition or might have withheld its consent to any license. *Federal Power Commission v. Idaho Power Company, supra.*

Numerous later decisions have reaffirmed the principle that "the function of the reviewing court ends when an error of law is laid bare."

In *Moog Industries v. Federal Trade Commission*, 355 U.S. 411, 2 L. Ed. 2d 370, 78 S. Ct. 377 (1958), the agency had issued a cease and desist order, effective immediately. The Court of Appeals affirmed but provided that the order should take effect "at such future time as the * * * Court of Appeals * * * may direct * * *." The Supreme Court vacated the Court of Appeals' judgment holding that the lower appellate court had exceeded its authority in modifying the "ancillary features of a valid commission order." Id.

In *Public Utilities District No. 1 v. F. P. C.*, 242 F. 2d 672 (9th Cir. 1957), *Texas American Asphalt Co. v. Walker*, 177 F. Supp. 315 (S. D. Tex. 1959), and *Salzburg v. United States*, 176 F. Supp. 867 (S.D. N.Y. 1959) the reviewing courts correctly applied the principle described in *F. P. C. v. Idaho Power Co., supra*, by laying bare the administrative error and remanding without attempting to modify the agency's determination.

The Supreme Court, in apparently its most recent encounter with the principle, reaffirmed it in *Arrow Transportation Co. v. C. N. O. & T. P. Ry. Co.*, 379 U.S. 642, 13 L. Ed. 2d 550, 85 S. Ct. 610 (1965). The district court, finding an error of law in the determination of an Interstate Commerce Commission's order, had enjoined enforcement of the order. But the Supreme Court vacated the injunction, holding that the district court should have merely pointed out the error of law and remanded to the commission. In remanding, the Supreme Court again cited *F. P. C. v. Idaho Power Co., supra.*

There can be little doubt that the striking away from an allotment all of its normal future consequences would amount to a substantial modification or abridgement of the allotment. Compared to the judicial modifications disapproved by the Supreme Court in *F. P. C. v. Idaho Power, Moog Industries v. F. T. C.* and *Arrow Transportation Co. v. C. N. O. & T. P. Ry. Co.*, the modification of appellant's allotment created by the Court of Appeals' decision herein is an extremely drastic intrusion upon the administrative domain. In *Idaho Power Co.* the reviewing court affirmed the agency's grant of a license but erroneously struck out a condition attached to the license. In *Moog Industries* the reviewing court affirmed the cease and desist order but erroneously postponed indefinitely its future effect. In this

case, the Court of Appeals has permanently modified the allotment by abrogating its future effect. Whereas in *Moog* and *Idaho* the reviewing court was rebuked for modifying a mere ancillary feature of the agency's determination, the Court of Appeals in this case has destroyed the entire administrative determination, as far as its future effect is concerned.

The Court of Appeals, under the clear holdings in *F. P. C. v. Idaho Power Co., supra, Moog Industries v. F. T. C., supra,* and *Arrow Transportation Co. v. C. N. O. & T. P. Ry. Co., supra,* was powerless to modify appellant's allotment by striking out its future effect, and for this reason its judgment should be reversed.

3.

Since federal courts lack the power to perform legislative functions, the Court of Appeals could not have rendered 7 U.S.C. 1344(f)(8) inoperative.

The district court's conclusion that the Court of Appeals' caveat had "rendered inoperative 7 U.S.C. 1344 (f) (8)" is in clear contravention of the doctrine of separation of powers. The Court of Appeals' decision, which tacitly affirmed this conclusion, is equally erroneous. It is trite but correct that the first three articles of the Constitution divide the legislative, executive and judicial powers of the United States into three separate branches. It is also well known that the courts have recognized and preserved this separation. In *Hampton Jr. & Co. v. United States,* 276 U.S. 394 (1928) Chief Justice Taft stated that "* * * it is a breach of the National fundamental law if Congress gives up its legislative power and transfers it to the President, or to the judicial branch * * *."

The repeal or suspension of an Act of Congress is clear-

ly an act requiring the exercise of legislative power. It has long been well settled that federal courts cannot perform legislative functions. *Mississippi v. Johnson*, 4 Wall. 475 (1867). Furthermore, a suspension or repeal of the statute would leave the administrative agency with the power to establish petitioner's allotment in future years, but without any guidelines for the agency to follow in exercising this power. Such a result would be unconstitutional, since it is well settled that legislative functions cannot be delegated to an administrative agency unless the agency is first provided with an intelligible principle delimiting the agency's power. *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381; *United States v. Rock Royal Co-operative*, 307 U.S. 533; *Schechter v. United States*, 295 U.S. 495; *Panama Ref. Co. v. Ryan*, 293 U.S. 388; *Yick Wo v. Hopkins*, 118 U.S. 356; *Cf. Orleans Parish School Board v. Bush*, 242 F. 2d 156 (5th Cir. 1957).

CONCLUSION

For each of the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted and the judgment below reversed, with directions to remand to the administrative agency for further proceedings in accordance with the court's decision.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this ..... day of October, 1967, two copies of the foregoing petition for a writ of certiorari were served by mail, postage prepaid, upon counsel for appellee:

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